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Supreme Court, U.S.
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No. 04-601

In The

Supreme Court of the United States

DARRELL LEE SHAFER,

Petitioner,

vs.

MAGGIE MILLER-STOUT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DARRELL LEE SCHAFER, Petitioner, v. MAGGIE MILLER-STOUT, Respondent.	No. CS-00-0419-CI REPORT AND RECOMMENDATION TO DISMISS WITH PREJUDICE PETITION FOR HABEAS RELIEF (Filed Dec. 13, 2001)

BEFORE THE COURT on Report and Recommendation is Respondent's Answer and Memorandum of Authorities, which is construed as a Motion to Dismiss under Rule 8, RULES GOVERNING § 2244 CASES. (Ct. Rec. 40.) Also pending before the court is Petitioner's Motion for Appointment of Counsel. (Ct. Rec. 43.) Petitioner, currently imprisoned at the Airway Heights Corrections Center (AHCC), is proceeding pro se; Assistant Attorney General Diana M. Sheythe represents Respondent. The court has reviewed the file and the Motions and is fully informed.

FACTS

The facts were summarized by the Washington State Court of Appeals:

> Darrell Shafer was convicted of five counts of rape of a child, two counts of molestation and one count of attempted molestation. . . .
>
> Early in June 1995, Lisa U. reported to the Yakima police that her boyfriend, Mr. Shafer, had been sexually abusing her daughter, D. During interviews several days later with two

police officers and a Child Protective Services social worker, D described numerous sexual contacts involving Mr. Shafer's hands, mouth, penis and a purple vibrator. She also stated that Mr. Shafer had "touched" her two friends, sisters A and M. Both A and M were then interviewed, and they described an incident when they had spent the night with D at Mr. Shafer's trailer. They claimed he touched them with his hands and the purple vibrator. All these incidents had occurred during the previous year, when D was 9, M was 8, and A was 10.

Mr. Shafer was arrested and charged in late June 1995 with three counts of first degree rape of a child (RCW 9A.44.073) or alternatively, three counts of first degree child molestation (RCW 9A.44.083). This information was amended in August 1995 to seven counts of first degree rape of a child, with seven alternative counts of first degree child molestation, and one independent count of first degree child molestation. A competency hearing was held in October 1995 and the three children were found competent to testify at trial.

After a series of continuances, trial began in January 1996. The court first held a hearing pursuant to RCW 9A.44.120 and *State v. Ryan,* 103 Wn.2d 165, 691 P.2d 197 (1984), to determine whether out-of-court statements by D, A and M could be presented at trial. Noting that all three children were scheduled to testify and that their statements appeared to be reliable, the court ruled the statements admissible. At trial, Randy U. (D's father), Lisa U., the girls' school counselor, the social worker, the two investigating police officers and the three girls testified. Dr. Roy Simms testified that he found no trauma to D's

body, but that her statements supported his diagnosis of sexual abuse.

Additionally, the State presented the testimony of Robyn Light, an expert in interviewing child victims of sexual abuse. Ms. Light testified that skilled interviewers look for "sensory details" to determine whether a sexual abuse allegation should be further investigated. Ms. Light did not interview D, A or M herself, but she examined the statements recorded by Detective Edmond Campbell. (Detective Campbell had not yet testified.) When the State asked Ms. Light if she detected sensory details in Detective Campbell's interviews, defense counsel objected, arguing that this line of questions concerned the credibility of the child witnesses and invaded the province of the jury. The trial court overruled the objection but gave four limiting instructions during this testimony. These instructions cautioned the jury that the facts relied on by Ms. Light may or may not be in the record, and the facts should only be considered as the basis for her opinion. The jury was also instructed that her opinion was relevant only to show whether or not each child's interview was consistent with Ms. Light's theories. Ms. Light related numerous instances of specific sexual conduct and graphic details contained in Detective Campbell's interviews of D, A and M.

Following Ms. Light's testimony, the State called Detective Campbell to the stand. In response to defense objections and concerns that repetition of the victims' out-of-court statements could unfairly prejudice Mr. Shafer, the court ruled that the detective could not read from his record, but must summarize the information. He connected particular sexual acts

with each victim, the time frame and the physical location. The State then rested.

The defense offered only two character witnesses. Following an unsuccessful motion to dismiss, the defense rested. The State then moved to again amend the information, changing Count VIII to attempted first degree child molestation. Over defense objection, the Motion was granted. The jury instructions were crafted to relate each count with a specific victim, time range and address. After deliberations had begun, the jury sent an inquiry to the court noting that two counts were identical and one count did not mention which victim was involved. Counsel from both parties met with the trial court and agreed to withdraw two of the original instructions (Numbers 19 and 23) and substitute three corrected instructions (Numbers 19.1, 23.1 and 23.2). Later, before the verdict was given, defense counsel challenged a juror for contacting a third party and discussing the case. The trial court questioned the juror and decided there was no evidence the juror had been affected by any outside conversations or information. After the guilty verdict, the court polled the jurors and all declared that no juror had injected outside information into the deliberations.

Citing abuse of a position of trust and the operation of the multiple offense policy, RCW 9.94A.390(2), the trial court imposed an exceptional sentence of 360 months.

(Ct. Rec. 38, Ex. 3 at 1-5, footnotes omitted.) Petitioner was convicted of the following charges: five counts, first degree rape of a child; two counts, first degree child

molestation; and one count, attempted first degree child molestation. (Ct. Rec. 38, Ex. 1.)

Following the convictions, Petitioner, through counsel, appealed his convictions; he also filed a *pro se* supplemental brief. (Ct. Rec. 38, Ex. 4, 5.) A Petition for Review by the Washington State Supreme Court was denied. (Ct. Rec. 38, Ex. 8.) Petitioner then sought *pro se* collateral review; the Court of Appeals dismissed his Personal Restraint Petition. (Ct. Rec. 38, Ex. 14.) Discretionary review was denied, as was a Motion to Modify Commissioner's Ruling and Motion to Add New Grounds for Relief. (Ct. Rec. 38, Ex. 16, 17, 19.)

The instant Second Amended Petition (Ct. Rec. 10) for federal habeas review raises the following issues:

(1) Denial of due process by admission of testimony from two witnesses that invaded the province of the jury, specifically:

> (a) the expert opinion of Dr. Roy Simms who vouched for the credibility of the child victim;
>
> (b) the expert testimony by Robyn Light who vouched for the credibility of the victims;

(2) Governmental misconduct and tampering of evidence by Detective Ed Campbell;

(3) Ineffective assistance of counsel, as demonstrated by the following specifics:

> (a) counsel failed to subpoena any of Petitioner's witnesses;
>
> (b) counsel failed to properly investigate the case;

(c) counsel failed to produce crucial, critical evidence in his possession;

(d) defense counsel failed to impeach M with prior inconsistent statements;

(e) defense counsel failed to timely and continuously object to testimony regarding "alleged threats to kill" made by Petitioner to D and her mother;

4. Insufficient evidence or credible corroboration to support the convictions on Counts I, II, III, IV, V, VI, VII, VIII;

5. The Revised Code of Washington, specifically sections 9A.44.073 and 1.08.017, violates the federal Constitution;

6. The admission and repetition of cumulative hearsay from six witnesses deprived Petitioner of a fair jury trial;

7. The admission of testimony referring to alleged threats made by Petitioner to kill was unduly prejudicial and denied Petitioner a fair trial;

8. Newly discovered evidence warrants the vacation of the convictions and a remand for a new trial based on a plea of guilty by D's father to raping his daughter, proof he was, in fact, guilty of the allegations for which Petitioner was convicted;

9. Petitioner was denied due process when an exceptional sentence was imposed based on unproven allegations made during the pre-sentence investigation.

Respondent moves to dismiss the Petition, asserting several claims are unexhausted and now procedurally

defaulted while others should be dismissed on the merits as failing to demonstrate a federal Constitutional violation. Respondent admits claims one, three (d), four, six, and seven were exhausted during direct appeal and claims two, three (a), eight and nine during collateral review. Respondent further contends claims three (b), (c), and (e), as well as claim five remain unexhausted because the former were not raised to the Washington Supreme Court in any form and the latter was presented only as a matter of state law.

Subject to a few exceptions not at issue here, a petitioner who is in state custody and wishes to collaterally challenge a state conviction by a petition for writ of habeas corpus must first exhaust state judicial remedies. *See* 28 U.S.C. § 2254(b)(1); *Rose v. Lundy,* 455 U.S. 509, 518 (1982). The exhaustion requirement is based on principles of comity. In the words of the Supreme Court, "[I]t would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." *Picard v. Connor,* 404 U.S. 270, 275 (1971) (quoting *Darr v. Burford,* 339 U.S. 200, 204 (1950)).

A petitioner can satisfy the exhaustion requirement by invoking one complete round of the State's established appellate review process. *O'Sullivan v. Boerckel,* 526 U.S. 838, 845 (1999); *Johnson v. Zenon,* 88 F.3d 828, 829 (9th Cir. 1996). The state courts have been given a sufficient opportunity to hear an issue when the petitioner has presented the state's highest court with the issue's factual and legal basis. *See Duncan v. Henry,* 513 U.S. 364, 365 (1995) (legal basis); *Correll v. Stewart,* 137 F.3d 1404, 1411-12 (9th Cir. 1997), *cert. denied,* 525 U.S. 984 and 525

U.S. 996 (1998) (factual basis). A habeas claim must "include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief." *Gray v. Netherland,* 518 U.S. 152, 162-63 (1996). The Ninth Circuit has held a state prisoner has not "fairly presented" federal claims in state court unless the prisoner has indicated to that court a basis in federal law for those claims. *See Hiivala v. Wood,* 195 F.3d 1098, 1106 (9th Cir. 1999), *cert. denied*, 529 U.S. 1009 (2000). "[A] petitioner for habeas corpus relief under 28 U.S.C. § 2254 exhausts available state remedies only if he characterized the claims he raised in state proceedings specifically as federal claims." *Lyons v. Crawford,* 232 F.3d 666, 670 (9th Cir. 2000), *amended on other grounds,* 247 F.3d 904 (2001). To characterize claims specifically as federal claims, "the petitioner must have either referenced specific provisions of the federal constitution or statutes or cited to federal case law." *Id.*

The court has reviewed the briefs submitted to the state courts and agrees with Respondent's conclusions claims three (b), (c) and (e) and five are unexhausted. Claim five was raised in Petitioner's *pro se* Motion for Discretionary Review following the denial of his Personal Restraint Petition; however, although there was mention of a Fourteenth Amendment violation, the development of the argument focused solely on whether RCW 9A.44.073 was the result of an enactment clause in conformity with state law. ("The 'COA' statement at page 12 of the Order Dismissing Personal Restraint Petition, that states '[t]he statutes under which Mr. Shafer was convicted are all part of legislation that contained a title and an enactment clause.' This statement is not true, RCW 9A.44.073 has no enactment clause and this court needs to address this

issue right at this time." (Ct. Rec. 38, Ex. 15 at 14.)) Petitioner's argument is insufficient under the standard announced in *Duncan,* 513 U.S. at 365, to specifically identify a federal constitutional claim. Alternatively, were this court to address the claim on the merits, the undersigned would agree with the state court's ruling "the statutes under which Mr. Shafer was [sic] convicted are all part of legislation that contained a title and enactment clause." *See* Laws of 1988, Ch. 145, §§ 2, 5; Laws of 1990, Ch. 3; Laws of 1994, Ch. 271, § 303.

As for claims three (b), (c) and (e), Petitioner's brief in support of Discretionary Review by the Supreme Court following dismissal of the PRP by the Court of Appeals limits the ineffective assistance of counsel claim to facts involving allegations both the prosecutor and defense counsel interfered in securing the appearance of Petitioner's suggested witnesses in court.[1] Thus, claims three (b), (c) and (e) were not exhausted, are now time-barred by RCW 10.73.090 and, thus, procedurally barred. *See also,* RCW 10.73.140 (prohibition against the filing of successive collateral challenges), and RAP 16.4(d) (no more than one petition for collateral relief will be entertained absent a showing of good cause).

This court may not proceed to the merits of a procedurally defaulted claim unless a prisoner demonstrates "cause" for the default and "actual prejudice" as a result of the alleged violation of federal law, or demonstrates the failure to consider the claim would result in a fundamental

[1] The ineffective assistance of counsel claim involving a failure to impeach M (claim 3(d)) was raised by counsel on direct appeal to both the Court of Appeals and the Supreme Court; thus, that claim is exhausted. (Ct. Rec. 38, Ex. 7 at 19.)

miscarriage of justice. *Coleman v. Thompson,* 501 U.S. 722, 750 (1991); *McCleskey v. Zant,* 499 U.S. 467, 494 (1991). To establish cause for a procedural default, a petitioner must demonstrate some external and objective factor impeded efforts to comply with the state's procedural rule. *See Murray v. Carrier,* 477 U.S. 478, 488 (1986). Such external factors include interference by state officials, unavailability of the factual or legal basis for a claim, or a showing of constitutionally ineffective assistance of counsel. *See id.* No such showing has been made. Accordingly, **IT IS RECOMMENDED** claims three (b), (c), and (e) as well as claim five be **DISMISSED WITH PREJUDICE.**

FEDERAL CLAIMS: STANDARD OF REVIEW

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (AEDPA), federal habeas corpus relief from a state court judgment will be granted when a petitioner demonstrates the state court's adjudication of the claim on its merits "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d); in other words, if it applied a legal rule which contradicts a prior United States Supreme Court holding. *Ramdass v. Angelone,* 530 U.S. 156, 165 (2000) (citing *Williams v. Taylor,* 529 U.S. 362, 120 S. Ct. 1495, 1516 (2000)). Relief also is appropriate "if, under clearly established federal law, a state court has been unreasonable in applying the governing legal principle to the facts of the case." *Id.*

In *Williams,* 120 S. Ct. at 1505-06, the court announced the "clearly established federal law" standard of § 2254(d)(1) is the equivalent of the "old rule" standard under *Teague v. Lane*:

> In *Teague v. Lane,* 489 U.S. 288 (1989), we held that the petitioner was not entitled to federal habeas relief because he was relying on a rule of federal law that had not been announced until after his state conviction became final. The antiretroactivity rule recognized in *Teague*, which prohibits reliance on "new rules," is the functional equivalent of a statutory provision commanding exclusive reliance on "clearly established law." Because there is no reason to believe that Congress intended to require federal courts to ask both whether a rule sought on habeas is "new" under *Teague* – which remains the law – and also whether it is "clearly established" under AEDPA, it seems safe to assume that Congress had congruent concepts in mind. It is perfectly clear that AEDPA codifies *Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final.

In *Williams*, the Court observed a rule is "old" or, in other words, a law is clearly established under *Teague*, if it was "dictated by precedent existing at the time the defendant's conviction became final." *Williams,* 120 S. Ct. at 1506 (citing *Teague*, 489 U.S. at 301). In contrast, a rule that "breaks new ground or imposes a new obligation on the States or the Federal Government," is a "new rule," and in this context, would not be a "clearly established" law. *Williams* confirmed the principle that "apart from the Supreme Court, federal habeas courts ought not act as

innovators in the field of criminal procedure, thereby upsetting state convictions because state courts were not prescient and, thus, failed to comply with federal law that did not exist at the time they ruled." *O'Brien v. Dubois,* 145 F.3d 16, 23 (1st Cir. 1998) (citations omitted). Under § 2254(d)(1), the threshold question for a reviewing court is whether the rule of law a petitioner seeks to apply "was clearly established at the time his state-court conviction became final." *Williams,* 120 S. Ct. at 1511. If the rule of law was clearly established, then the court next determines whether the state court's decision was either "contrary to or involved an unreasonable application of" that rule of law. *Id.* at 1512; *see also Baker v. City of Blaine,* 221 F.3d 1108, 1110 n.2 (9th Cir. 2000) (addressing unreasonable application prong).

The role of circuit law in the federal habeas review process is limited. A federal district court may use similar cases from the Ninth Circuit and other circuits to help determine whether Supreme Court law on a particular subject is "clearly established" and whether a state court decision is within the scope of "reasonable" applications of Supreme Court law, but a federal district court cannot overturn a state court decision on habeas review because of a conflict with Ninth Circuit law. *Van Tran v. Lindsey,* 212 F.3d 1143, 1154 (9th Cir.), *cert. denied,* 531 U.S. 944 (2000), citing *Duhaime v. Ducharme,* 200 F.3d 597 (9th Cir. 1999).

VOUCHING OF PROSECUTION WITNESSES

Petitioner asserts the testimony of expert witnesses Dr. Roy Simms and Robyn Light, a sexual abuse interview expert, unconstitutionally vouched for the credibility of the

child victims. Although errors involving the admission of evidence generally constitute matters of state law and do not reach federal constitutional magnitude, if the admission of the evidence violated due process by rendering the trial fundamentally unfair, then habeas relief is available. *See United* States *v. Young,* 470 U.S. 1, 18-19 (1985) (holding it is unconstitutional for the prosecution to vouch for the truthfulness of a witness); *Lambright v. Stewart,* 220 F.3d 1022, 1029 (9th Cir. 2000). When the court finds the admission of the evidence violated due process, the court must then determine whether the error was sufficiently prejudicial as to warrant habeas relief. *See Brecht v. Abrahamson,* 507 U.S. 619, 637 (1993).

The Court of Appeals addressed this issue on the merits:

> Dr. Roy Simms testified that he found no trauma to D's body, but that her statements supported his diagnosis of sexual abuse.
>
> Additionally, the State presented the testimony of Robyn Light, an expert in interviewing child victims of sexual abuse. Ms. Light testified that skilled interviewers look for "sensory details" to determine whether a sexual abuse allegation should be further investigated. Ms. Light did not interview D, A or M herself, but she examined the statements recorded by Detective Edmond Campbell. (Detective Campbell had not yet testified.) When the State asked Ms. Light if she detected or [sic] sensory details in Detective Campbell's interviews, defense counsel objected, arguing that this line of questions concerned the credibility of the child witnesses and invaded the province of the jury. The trial court overruled the objection but gave four limiting

instructions during this testimony. These instructions cautioned the jury that the facts relief [sic] on by Ms. Light may or may not be in the record, and the facts should only be considered as the basis for her opinion. The jury was also instructed that her opinion was relevant only to show whether or not each child's interview was consistent with Ms. Light's theories. Ms. Light related numerous instances of specific sexual conduct and graphic details contained in Detective Campbell's interviews of D, A and M.

. . . .

Expert testimony is admissible pursuant to ER 702 if (1) the witness is qualified as an expert by experience, training or education; (2) the witness's opinion is based on a theory generally accepted in the scientific community; and (3) the testimony is helpful to the trier of fact. . . . The expert qualifications of Ms. Light and Dr. Simms are not challenged on appeal. . . . Our focus, accordingly, is on the "helpfulness" of the expert opinions.

Generally, expert evidence is helpful if it concerns matters beyond the common knowledge of the layperson and does not mislead the jury. Such evidence is not considered helpful if its prejudicial nature is great. While opinion testimony need not be excluded merely because it encompasses an ultimate issue of fact, no witness may testify as to the guilt of a defendant, whether by direct statement or inference. Neither may an expert usurp the exclusive function of the jury to weigh the evidence and determine credibility.

Ms. Light testified that a skilled interviewer looks to see if a child includes sensory details when describing alleged incidents of sexual abuse. She told the jury children are incapable of describing the sights, sounds, smells and feelings that accompany specific acts unless they have directly experienced those acts. She then recited numerous examples of sensory details gleaned from Detective Campbell's interviews with D and M. In effect, she implied that D's and M's allegations of sexual abuse were truthful because they included multiple sensory details.

At one time, Washington courts might have frowned on such testimony. In *Black [State v.]*, [109 Wn.2d 336, 341, 745 P.2d 12 (1987)], a social worker testified that the alleged victim fit a profile for rape victims. The Supreme Court held that this expert opinion unfairly prejudiced the accused by implying the complainant was telling the truth and indirectly offering an opinion on the accused's guilt. More recently, however trial courts have given greater latitude to expert testimony that tends to corroborate the testimony of child sexual abuse victims. In *Holland [State v.]*, [77 Wn. App. 420, 891 P.2d 49, *review denied*, 127 Wn.2d 1008 (1995)], the appellate court held that because the credibility of the victim had been put in issue, an expert could testify it was not uncommon for a sexual abuse victim to delay reporting. A social worker in *Florczak [State v.]*, 76 Wn. App. 55, 882 P.2d 199 (1994), *review denied*, 126 Wn.2d 1010 (1995)] testified that several symptoms suffered by an alleged victim "could be correlated with a child who has been sexually abused.'" The appellate court held that this observation that the child exhibited behavior typical of a group was not a *conclusion* that the child

had in fact been sexually abused or that the defendant was guilty. Accordingly, the expert's testimony did not invade the jury's province to weight [sic] the evidence and make credibility determinations.

When viewed in the light of these recent opinions, Ms. Light's expert opinion may be considered helpful to the jury and not unfairly prejudicial. She testified that interviewers look for sensory details when deciding whether "a sex abuse allegation [is] something that [they] want to continue to investigate." She then recounted all the details she considered "sensory" in the interviews of D and M. Because she did not make a direct comment on the defendant's guilt or the victims' veracity, the jury was left to decide whether the details sufficiently supported the credibility of the victims and whether Mr. Shafer committed the offenses.

Dr. Simms, on the other hand, presented an inadmissible diagnosis of sexual abuse. He offered no scientific basis for his opinion: the physical examination provided no evidence of abuse (although it did not rule out abuse) and his diagnosis was based entirely on the medical history he obtained from D. A doctor's diagnosis of sexual abuse is inadmissible if based only on the statements of an alleged victim. In light of the overwhelming untainted evidence provided by D, M, A, D's father and mother, Ms. Light, Detective Campbell and the school counselor, however, we find that Dr. Simms's erroneously admitted diagnosis was harmless.

(Selected citations and footnotes omitted; Ct. Rec. 38, Ex. 3 at 3, 6-9.)

The question, under the standard of the AEDPA, is whether the state court's analysis was contrary to or an unreasonable application of established law as determined by the Supreme Court law. Even if such constitutional trial error is established, the court must then determine whether the error had a substantial and injurious effect or influence in determining the jury's verdict. *See Penry v. Johnson,* 532 U.S. 782, ___ (2001), citing *Brecht,* 507 U.S. at 637, and *Kotteakos v. United States,* 328 U.S. 750, 776 (1946)). This standard reflects the "presumption of finality and legality" which attaches to a conviction at the conclusion of direct review. *Brecht,* at 633. It protects the State's sovereign interest in punishing offenders and its "good-faith attempts to honor constitutional rights," *Brecht,* at 635, while ensuring the extraordinary remedy of habeas corpus is available to those "'whom society has grievously wronged,'" *Brecht,* at 634 *(quoting Fay v. Noia,* 372 U.S. 391, 440-441 (1963)).

In his legal memorandum, Petitioner has not argued the state court's decision violated Supreme Court law; rather he confines his legal analysis to cases from various circuit courts. He cites *Snowden v. Singletary,* 135 F.3d 732 (11th Cir. 1998), *cert. denied,* 525 U.S. 963 (1998), which held in a habeas proceeding that an expert on child abuse who testified that 99.5% of children tell the truth regarding sexual encounters and that he had never personally encountered an instance where a child had invented a lie about abuse, violated fundamental fairness necessitating habeas relief. *Snowden,* at 737. Even were this court to find the opinion persuasive as to Petitioner's

claim,[2] the state court's decision here was not a violation of Supreme Court law as required by the AEDPA, but rather, at most, a violation of 11th circuit law.

The court has reviewed Ms. Light's testimony and finds there was no direct statement regarding the credibility of the child victims; rather, there was only testimony as to the sensory details in the statements provided by the child victims to the police. (Ct. Rec. 38, Ex. 25 at 640-652.) Additionally, the court instructed the jury as follows:

> Members of the jury, the court instructs you that this particular witness is an expert witnesses [sic] and is here to offer an opinion as compared to being a fact witness and person who observed anything and has first hand knowledge about it. In this kind of case it is permitted that an expert offer an opinion based upon her qualifications, training and education. However, this is not the same thing as saying that this person is here to tell you that a person did something, or did not do something, or the person is more likely or not more likely to have done a specific thing. We are talking about consistencies and inconsistencies only at this time. And whether or not it is inconsistent or consistent that there is a delay in the reporting by a child, or children in this case, or whether or not here is a recantation or not a recantation as you may find in your facts, that's for you to decide. Each of you decides.

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[2] Unlike the facts at bar, there was little evidence other than the expert's testimony supporting the guilt of the defendant. The complaining witness at trial was six years old and the abuse had occurred some two years prior.

> It's permissible for this witness to express an opinion as to whether certain things are consistent or inconsistent with th generally-accepted theories in her field. But she cannot state and will not state to you any conclusions that a person did or didn't do something. The only reason you are to consider this evidence is whether or not it makes it more probably true than not true that something is consistent or inconsistent. That is the only purpose of offering this testimony at this time.

(Ct. Rec. 38, Ex. 25 at 636-37.) The court reiterated the substance of this instruction later during Ms. Knight's testimony (Ct. Rec. 38, Ex. 25 at 640) and then gave the following cautionary instruction:

> Members of the jury, and I'm going to instruct you to follow this instruction. This witness is now relating to the jury certain things upon which she bases her opinion. She's referred to this from time to time as different events that she's observed by reviewing the record. Whether you refer to these as facts or the basis for an opinion, you are instructed that these facts upon which she bases her opinion are permitted here only for the purpose of showing to you what the underlying basis is of her opinion, and not for the truth of those matters that are being related. So if she says, for example, someone said the sky was falling, which is not anywhere in our record, she uses that basis for her opinion. It isn't for the purpose of showing the sky actually fell. It's for the purpose of explaining her opinion.
>
> And I am purposefully avoiding repeating any part of any testimony to avoid any comment by me about whether or not it is or isn't a fact,

> which all of these matters are for you to decide ultimately. That's your job as the fact finder. This person may assume facts and state them as the basis for her opinion, but it's your job to determine the ultimate facts in this case. It is not the job of this witness to state ultimate facts, nor her personal beliefs. But again relate this to the earlier cautionary instruction whether what you have observed in this court is either consistent or inconsistent with some of the issues you have to decision [sic].

(Ct. Rec. 38, Ex. 25 at 643-644.) Finally, at the end of Ms. Knight's testimony on direct, the court instructed the jury for a third time:

> This part of the trial, this particular witness is relating things that are claimed by her to be part of the record. Whether something is or isn't part of the record of these proceedings is for you to decide. She relates these as facts she's observed by her study of a record. It may or may not be the same record that was produced in this court. The facts then that she is relating are not being submitted to you today as proof of such facts, only for the purpose of showing the basis for her opinion.

(Ct. Rec. 38, Ex. 25 at 646-647.) The court concludes the substance of Ms. Knight's testimony was confined to an analysis of the child's statements in light of the scientific theory that the statements of sexual abuse were supported by sensory, emotional and peripheral facts which would were outside the normal experience of a minor child who had not experienced sexual abuse. This was a scientifically supported theory or tool to enable the jury to judge the credibility of the child witnesses. It was this aspect of her

testimony which was stressed by the state during closing argument. (Ct. Rec. 38, Ex. 27 at 887-888.) Additionally, in instructing the jury as noted above, the court was careful not to repeat the child's statements, but rather instructed the jury in general terms. Any prejudicial error was corrected by the instructions which reminded the jurors they were the ultimate fact finders. *See Dubria v. Smith*, 224 F.3d 995, 1002 (9th Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S. Ct. 1089 (2001).

As for Dr. Simm's testimony, the state court concluded, although error, it was not prejudicial in light of the other evidence of record. As noted previously, even assuming without deciding the error was of constitutional magnitude, this court would have to conclude the error had a substantial and injurious effect or influence in determining the jury's verdict. *See Penry*, 532 U.S. at (2001), citing *Brecht*, 507 U.S. at 637, and *Kotteakos*, 328 U.S. at 776. Dr. Simms testified the child did not name Petitioner as her assailant; thus, there was no evidence from Dr. Simms implicating Petitioner as the guilty party. (Ct. Rec. 38, Ex. 25 at 574.) In light of the trial court's instructions to the jury, the court concludes no such effect has been demonstrated within the meaning of the habeas statute. Accordingly, **IT IS RECOMMENDED** claim one be **DISMISSED WITH PREJUDICE.**

INTIMIDATION OF DEFENSE WITNESSES

Petitioner asserts the his due process rights under the Fourteenth Amendment and Sixth Amendment right to compulsory process were violated when Detective Ed Campbell contacted defense witnesses and advised them it

would not be necessary for them to appear in court and testify. In addressing this claim, the state court noted:

> Mr. Shafer's next alleged ground for a new trial was claimed witness tampering by the deputy prosecutor and a police detective. In denying the motion, the court ruled Mr. Shafer had produced no proof of such conduct. Now, in his petition and support documents, Mr. Shafer also fails to provide competent proof of this claim beyond mere conclusory or hearsay allegations.

(Ct. Rec. 38, Ex. 14 at 8.) A factual finding by a state court is presumed correct unless the presumption is rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Petitioner has submitted multiple affidavits in support of this claim, which would raise an inference Petitioner now is attempting to support his claim with specific facts. (Ct. Rec. 11, Exs. B, C, D, E, E.1.)

Under 28 U.S.C. § 2254(2), if the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless (i) the applicant shows the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court or (ii) the factual predicate could not have been previously discovered through the exercise of due diligence. There is no argument by Petitioner that there is a relevant new Supreme Court rule made retroactive to pending habeas cases; accordingly, Petitioner is not entitled to an evidentiary hearing under the first prong. Additionally, Petitioner does not provide an evidentiary basis to support a finding by this court that the evidence now offered could not have been found earlier with due diligence. Finally, the court notes two character witnesses

testified on Petitioner's behalf. (Ct. Rec. 38, Ex. 25 at 715-724; Ex. 26 at 778-808.). Petitioner is not entitled to an evidentiary hearing on the affidavits presented in this Petition. **IT IS RECOMMENDED** claim two be **DISMISSED WITH PREJUDICE**.

INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner asserts he was denied effective assistance of counsel when counsel failed to subpoena any of Petitioner's witnesses and failed to impeach M, a child witness, with prior inconsistent statements. In addressing these assertions, the Court of Appeals stated the following:

> Mr. Shafer does not specify how he was prejudiced by counsel's decisions not to pursue the witnesses. He provides no competent evidence to indicate how any particular witness would have helped his case. His claim therefore fails for lack of evidentiary support. Moreover, a decision to call or not call, or even interview, a witness is a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel.

Ct. Rec. 38, Ex. 14 at 3.)

> Mr. Shafer next contends he had ineffective assistance of counsel. During the pretrial competency hearing, M stated that Mr. Shafer did not penetrate her body with his body or the vibrator. At trial, however, she testified on direct that he put the "massager" inside her "private." He contends his trial counsel should have cross-examined M with her prior inconsistent statement, and that the failure to do so requires

> reversal of his conviction for first degree child molestation of M.
>
> . . . .
>
> Here, although Mr. Shafer's trial counsel did not try to impeach M with her prior inconsistent statement, he did not need to. During his cross-examination he asked her if the massager went "all the way inside" her. She said no. He then asked if Mr. Shafer just rubbed it on the outside. She said yes. Finally, he asked if the massager went inside her anus. Again, she said no. Clearly he did not need to mention her prior inconsistent testimony because he was able to elicit the answers he wanted anyway. Further even if he had failed to impeach her statement on direct that the vibrator entered her private, the error evidently was not prejudicial. He was, after all, convicted only of child molestation, which does not require the element of penetration.

(Ct. Rec. 38, Ex. 3 at 13-14.)

Because this claim was adjudicated on the merits in the state court, a writ of habeas corpus cannot be granted unless the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; . . . or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d). The state court relied on the test for ineffective assistance of counsel enunciated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). (Ct. Rec. 38, Ex. 3 at 14, Ex. 14 at 2.) That test is "clearly established" Supreme Court law, *Terry Williams v. Taylor*, 529 U.S. 362, 390 (2000), and, thus, eliminates

the "contrary to" prong of 28 U.S.C. § 2254(d) as a basis for federal habeas relief. Accordingly, the issue in the instant case is whether the state court decision involved an "unreasonable application" of *Strickland*. *See Williams*, 529 U.S. at 410.

An "unreasonable application" occurs if the state court identifies the correct governing legal rule, but unreasonably applies it to the facts of the particular state prisoner's case or correctly identifies the governing legal rule, but either unreasonably extends the principle to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. *Williams*, 529 U.S. at 406. The "unreasonable application" is determined, not by reference to a "reasonable jurist" standard, but by analyzing the question of whether the application was "objectively unreasonable" (as opposed to an incorrect or erroneous application). *Williams*, 529 U.S. at 410. Claims of ineffective assistance of counsel are mixed questions of law and fact. *See Crotts v. Smith*, 73 F.3d 861, 864 (9th Cir. 1996), superseded by statute as stated in *Van Tran v. Lindsey*, 212 F.3d 1143 (9th Cir.), cert. *denied*, 531 U.S. 944 (2000). Here, there is no dispute as to the facts; thus, the only issue is a legal one.

Petitioner contends counsel's performance fell below the accepted professional standard when he failed to subpoena witnesses suggested by Petitioner and failed to impeach M by revealing prior inconsistent statements.[3]

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[3] Petitioner now asserts certain alibi evidence, contending he was not at the location where and when the crimes allegedly occurred. The court has reviewed his submission to the state court and finds no assertion of alibi; thus, to the extent such a claim is raised, it is

(Continued on following page)

The state court concluded no evidentiary basis demonstrated prejudice regarding the failure to hear the testimony of defense witnesses; this conclusion is not contrary to federal law. *See James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994), *cert. denied*, 513 U.S. 935 (1994) (counsel not ineffective when a petitioner states conclusory allegations unsupported by specific facts).

Under 28 U.S.C. § 2254(2), if the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless (i) the applicant shows the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, or (ii) the factual predicate could not have been previously discovered through the exercise of due diligence. There is no argument by Petitioner that there is a relevant new Supreme Court rule made retroactive to pending habeas cases; accordingly, Petitioner is not entitled to an evidentiary hearing under the first prong. Additionally, Petitioner does not provide an evidentiary basis to support a finding by this court that the evidence now offered could not have been found with due diligence. Finally, the state court noted the decision to investigate and call witnesses is an issue of legitimate trial tactics. This conclusion is in conformity with federal law. Mere criticism of a counsel's trial tactic or strategy is not in itself sufficient to support a charge of inadequate representation. *Gustave v. United States*, 627 F.2d 901, 904 (9th Cir. 1980). The state court conclusion was not contrary to nor an unreasonable application of Supreme Court law.

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unexhausted and now procedurally defaulted. *See Correll*, 137 F.3d at 1411-12.

As for the allegation defense counsel failed to impeach M, Petitioner must demonstrate counsel's performance was unreasonable under the totality of the circumstances, as well as prejudice under *Strickland's* second prong. Impeachment evidence is considered a matter of trial tactics. *See Gustave*, 627 F.2d at 905. Additionally, prejudice requires a showing there was a reasonable probability the impeachment would have affected the verdict. As noted by the state court, the jury convicted Petitioner of the lesser charge, which did not include the element of penetration. Accordingly, there has been no demonstration the state court decisions dismissing the ineffective assistance of appellate counsel [sic] claim on collateral review were "unreasonable application[s]" of clearly established Supreme Court law. **IT IS RECOMMENDED** claims three (a) and (d) be **DISMISSED WITH PREJUDICE.**

INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTIONS

Petitioner contends there is insufficient evidence to support the convictions because there is no medical evidence of penetration and the victim's testimony was not consistent with oral-genital penetration, as evidenced at RP 519. (Ct. Rec. 38, Ex. 24 at 519.) Additionally, Petitioner contends the state failed to elect which acts constituted the factual basis for the various counts. In addressing this claim, the state court ruled as follows:

> Mr. Shafer next contends the evidence is insufficient to support the guilty verdict on the five charges of rape involving victim D. He argues the evidence does not support the essential element

> of penetration required for each of these convictions.
>
> . . . .
>
> First degree rape of child, the charge in dispute in Counts I, II, IV, V and VI, requires proof of sexual intercourse with a child less than 12-years-old. . . .
>
> We find circumstantial or direct evidence of penetration in the record to support each of the five convictions rape of D. Additionally, each count is specifically limited to a particular time frame and location. D, D's mother, and/or Detective Campbell (testifying as to D's hearsay statements during his interviews) described actual or inferred penetration of D's labia by Mr. Shafer's fingers, penis or vibrator (counts I, II, V and VI). Although D's mother originally testified she shut her eyes whenever Mr. Shafer put his penis to D's vagina, she admitted she heard her daughter struggle and scream and later remembered seeing the vibrator and Mr. Shafer's penis go into her daughter. Detective Campbell testified that D told him Mr. Shafer put his penis in her mouth (count IV). Viewing the evidence and the inferences in the light most favorable to the state we find that sufficient evidence supports the jury's verdict on each count.

(Citations and footnotes omitted; Ct. Rec. 38, Ex. 3 at 10-11.) During collateral review, the Court of Appeals Commissioner addressed a similar claim:

> Corroborative physical evidence is not required in child sex crime cases.
>
> The State's evidence shows that in Yakima County on or between March and May 1995, Mr.

> Shafer rubbed 9-year-old M's vagina with his hands and a purple vibrator. During the same time frame, he grabbed 10-year-old A's hand and tried to force her to touch his penis. (*See* RP 345-50, 394-95, 692-93, 869-71, 980-981). This is sufficient evidence for the jury to find Mr. Shafer guilty of both crimes beyond a reasonable doubt.

(Citations omitted.) (Ct. Rec. 38, Ex. 14 at 4-5.)

When hearing a sufficiency of the evidence claim in habeas, the court must determine whether the evidence, viewed in the light most favorable to the prosecution, would permit any rational trier of fact to conclude that the defendant was guilty beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). "Circumstantial evidence and inferences drawn from [the evidence] may be sufficient to sustain a conviction." *United States v. Lewis*, 787 F.2d 1318, 1323 (9th Cir.), amended on denial of reh'g, 798 F.2d 1250 (9th Cir. 1986). Personal testimony, even confused and contradictory testimony, can support a conviction. *See United States v. Frederick*, 78 F.3d at 1370, 1374 (9th Cir. 1996). Additionally, recantation of testimony, without more, is not grounds for habeas relief. *Hysler v. Florida*, 315 U.S. 411, 413 (1942) ("[m]ere recantation of testimony" does not justify voiding a conviction on due process grounds).

As noted previously, findings of fact by the state court are presumed correct, unless there is clear and convincing evidence to the contrary. The evidence Petitioner presents is testimony which was before the jury when they deliberated on the charges. It is not the function of this court to re-weigh the evidence or reassess credibility. Accordingly, **IT IS RECOMMENDED** claim four be **DISMISSED WITH PREJUDICE**.

REPETITIVE TESTIMONY

Petitioner contends no fewer than six witnesses testified to the hearsay complaints of D, M and A. Petitioner asserts expert witness Light re-emphasized the statement Detective Campbell took from D, especially in light of the fact the victims testified at trial. Additionally, Petitioner asserts it was a denial of due process to admit testimony describing Petitioner's alleged threats to kill D and Lisa U.

As noted earlier, any violation of an evidentiary rule is a matter of state law and cannot be the basis for federal habeas relief unless the error renders the trial fundamentally unfair. *Young*, 470 U.S. at 18-19; *Lambright*, 220 F.3d at 1029. Additionally, any due process violation involving trial procedure requires an additional analysis to determine prejudice as required under *Brecht*, 507 U.S. at 637. The State court addressed the issue as follows:

> Mr. Shafer does not challenge the admissibility of D's out-of-court statements; he merely contends their repetition was unnecessarily cumulative.
>
> It is true that statements admissible under the child hearsay statute are still subject to analysis under ER 403, which permits exclusion of evidence if its probative value is substantially outweighed by the danger of prejudice caused by needless presentation of cumulative evidence. The trial court here carefully exercised its discretion to avoid cumulative evidence. Early on, it noted its desire to keep repetition at a minimum. After a police officer introduced some of D's hearsay statements, the court told the parties (in camera) it was aware of the concerns regarding needless petition and promised to balance the

> relevance of each statement with its prejudicial effect under ER 403.
>
> The school counselor, the social worker and one of the officers were allowed to repeat statements D made to them. Each of these witnesses provided slightly different information and they were not merely repetitive. Randy U. state only that D told him Mr. Share had been "messing" with her private parts. Because MS. [sic] Light recited almost every sensory detail contained in Detective Campbell's report, the detective's testimony was stringently limited. Concerned that repetition of the details would be unnecessarily prejudicial, the court ordered him to summarize D's statements. Ms. Light's testimony, although loaded with incriminating detail, was not offered for the proof of the statements and did not tie specific acts to particular times and places. All in all, the court's careful exercise of discretion to admit some statements and exclude others was not abused.

(Citation omitted.) (Ct. Rec. 38, Ex. 3 at 12-13.) As for the testimony regarding the threats to kill D and Lisa U., the state court noted the statements "were not hearsay and were admissible under ER 801(d)(2) as admissions of a party opponent." (Ct. Rec. 38, Ex. 3 at 13.)

The record and trial court's analysis shows there were safeguards in place to prevent the unnecessary repetition of statements and testimony. (Ct. Rec. 38, Ex. 25 at 650-651.) This court concludes the state court's decision was not contrary to or an unreasonable application of clearly established Supreme Court law. Accordingly **IT IS RECOMMENDED** claims six and seven be **DISMISSED WITH PREJUDICE.**

NEWLY DISCOVERED EVIDENCE

Petitioner asserts the fact D's father later pleaded guilty to raping D is evidence which would exonerate Petitioner from the convictions at issue here. At the very least, Petitioner contends it would put the credibility of D's father's testimony against Petitioner at his trial at issue since the methods used by the father were similar to those used by Petitioner. Petitioner further claims there was a conspiracy by the state and the press to keep the news of the father's conviction from him. The state court found:

> Mr. Shafer's claim fails because the evidence of Mr. [U]'s alleged abuse was presented at trial and is in that sense cumulative to the trial testimony. And the fact of Mr. [U]'s guilty plea is unlikely to change the result of the trial due to the strength of the evidence against Mr. Shafer on each count.

(Ct. Rec. 38, Ex. 14 at 4.) Additionally, the Washington State Supreme Court Commissioner also found Mr. [U]'s statement on plea of guilty was admissible as a statement against his penal interest, but proved only that D was raped in 1998 by a man other than Petitioner. Even had the abuse begun earlier in 1994 of [sic] 1995, the time frame for the convictions before this court, the statement did not contradict the notion the child could have been molested by more than one man. (Ct. Rec. 38, Ex. 16 at 4.)

In *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997) (en banc), *cert. denied*, 523 U.S. 1133 (1998), the court held "a habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." *Id.* at 476. *See Jeffries v. Blodgett*, 5 F.3d 1180 (9th Cir. 1993), *cert. denied*, 513 U.S. 985 (1994) (announcing that the

existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not grounds for relief on federal habeas corpus); *see also Swan v. Peterson*, 6 F.3d 1373, 1384 (9th Cir. 1993) (holding newly discovered evidence is grounds for habeas corpus relief only when it both bears on the constitutionality of an applicant's conviction and would probably produce an acquittal). Here, the factual basis for U's guilty plea was based on events occurring in 1998, several years after the abuse which provided the factual basis for Petitioner's convictions. Moreover, there is no affirmative evidence of Petitioner's innocence. Mr. U's testimony at Petitioner's trial was limited to a recitation of the facts when D first reported she had been abused by Petitioner. He asked her simply if "Darrell had been messing with her" and then he stated he reported her positive response to the Yakima Police Department. (Ct. Rec. 38, Ex. 24 at 497-504.) He did not state details of the abuse to the jury. The state court's decision was not contrary to or an unreasonable application of clearly established Supreme Court law. Accordingly, **IT IS RECOMMENDED** claim eight be **DISMISSED WITH PREJUDICE.**

EXCEPTIONAL SENTENCE

Petitioner asserts the exceptional sentence imposed was in violation of due process and his rights under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). He contends the jury should have decided the credibility of the allegations of the presentence report. Petitioner also contends the state court should have considered the series of rapes as one continuous event, rather than separate independent crimes. Petitioner also argues the state court erred in finding he occupied a position of trust with respect to D,

because he did not spend that much time with her, but was out of the state or fishing.

Federal habeas relief does not lie for mere errors of state law. *Estelle v. McGuire*, 502 U.S. 62, 67 (1991); a state's interpretation of state law is binding on federal courts. *Mullaney v. Wilbur*, 421 U.S. 684 (1975). Federal courts are not authorized to inquire into state sentencing laws and will not review alleged errors of state sentences. *Miller v. Vasquez*, 868 F.2d 1116, 1119 (9th Cir. 1989), *cert. denied*, 499 U.S. 963 (1991) (whether a petitioner's sentence was properly enhanced is a question of state law and not cognizable in a habeas proceeding). The only review a federal court may conduct of a state sentence concerns whether the sentence was cruel and unusual, racially or ethnically motived or enhanced by indigency. *Makal v. Arizona*, 544 F.2d 1030, 1035 (9th Cir. 1976), *cert. denied*, 430 U.S. 936 (1977). None of those issues has been raised here.

The state court reviewed the factors which resulted in the enhanced sentence and found them to be supported by the record and sufficient to provide a legal basis for an exceptional sentence. The court further determined that, in light of the various sentencing factors, the term of 360 months was within the court's discretion and was not clearly unreasonable. (Ct. Rec. 38, Ex. 14 at 9-11.) The state court's findings and conclusions were not contrary to nor an unreasonable application of clearly established Supreme Court law.

Petitioner also relies on *Apprendi* as a legal basis for constitutional error. *Apprendi*, decided in June 2000, represents a new rule of constitutional law. Under 28

U.S.C. § 2254(2)(A), Petitioner is not entitled to an evidentiary hearing on such a claim unless the new rule has been made retroactive to cases on collateral review by the Supreme Court. The Supreme Court did not address the issue of retroactivity in the *Apprendi* opinion, has not addressed it in later opinions and there is no ruling on that issue from the Ninth Circuit. *See Dillard v. Roe*, 244 F.3d 758, 773 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 238 (2001), comparing *Jones v. Smith*, 231 F.3d 1227, 1238 (9th Cir. 2000) (declining to apply *Apprendi* rule retroactively in habeas proceeding) with *Hoffman v. Arave*, 236 F.3d 523, 543-48 (9th Cir.), *cert. denied*, ___ U.S. ___, 122 S. Ct. 323 (2001) (Pregerson, J., concurring) (urging retroactive application of *Apprendi* to petitioner's constitutional challenge to state statute requiring trial judge, rather than jury, to "determine facts that increase the potential penalty from life imprisonment to death").

In the absence of controlling law, the application of *Apprendi* to Petitioner's collateral proceedings is foreclosed by the non-retroactivity principle pronounced in *Teague v. Lane*, 489 U.S. 288 (1989). Under *Teague*, a new rule of law has no application to collateral proceedings unless it falls within one of two narrow exceptions to the nonretroactivity principle. The first *Teague* exception, which involves placing certain kinds of individual conduct beyond the power of the state to proscribe, is not applicable here, since homicide remains a crime. The second *Teague* exception, applicable here, requires the retroactive application of certain "watershed rules of criminal procedure." *Teague*, 489 U.S. at 312. Retroactive application will occur under this exception if both (1) a failure to adopt the new rule "creates an impermissibly large risk that the innocent will be convicted," and (2) "the procedure at issue

. . . implicate[s] the fundamental fairness of the trial." *Id.* To qualify under this exception, the new rule must do more than systematically enhance the reliability of a criminal proceeding; the rule must be an absolute prerequisite to the trial's fundamental fairness. *See Carriger v. Lewis*, 948 F.2d 588, 598 (9th Cir. 1991). Here, although Justice O'Connor in her dissenting opinion described the rule as one of "watershed" variety *(Apprendi*, 530 U.S. at 524), the courts have been divided on the issue. *See, e.g., Jones*, 231 F.3d at 1238 *(Apprendi* does not fit second exception); *United States v. Moss*, 252 F.3d 993, 997 (8th Cir. 2001) (same); *United* States *v. Latney*, 131 F. Supp.2d 31, 33 (D.D.C. 2001) (same, adding "the vast majority of district courts to consider this issue" agree); but see *Jackson v. United* States, 129 F. Supp.2d 1053, 1068 (E.D. Mich. 2001) *(Apprendi* a watershed rule that fits second exception); *United States v. Murphy*, 109 F.Supp.2d, 1059, 1064 (D. Minn. 2000) (same). This court is constrained by Ninth Circuit law. In *Jones*, the court held, at least as applied to the omission of certain elements from the state court information, *Apprendi* is neither implicit in the concept of ordered liberty, nor an absolute prerequisite to a fair trial. *Jones*, 231 F.3d at 1235-38.

Finally, this court concludes that the sentencing factors at issue are simply that – they are not elements of the crime; thus, *Apprendi*, even were it to be determined retroactive, is not applicable. *See McMillan v. Pennsylvania*, 477 U.S. 79, 84 (1986) (quoting *Patterson v. New York*, 432 U.S. 197, 207 (1977)); *Walton v. Arizona*, 497 U.S. 639, 647-48 (1990). Accordingly, Petitioner has not demonstrated the state court violated a clearly established law as determined by the Supreme Court or unreasonably

applied that law. **IT IS RECOMMENDED** claim nine be **DISMISSED WITH PREJUDICE.**

PENDING MOTIONS

In light of this court's recommendation to dismiss the claims in the instant Petition, **IT IS RECOMMENDED** all other pending Motions be **DENIED AS MOOT.**

OBJECTIONS

Any party may object to a magistrate judge's proposed findings, recommendations or report within ten (10) days following service with a copy thereof. Such party shall file written objections with the Clerk of the Court and serve objections on all parties, specifically identifying any the portions to which objection is being made, and the basis therefor. Any response to the objection shall be filed within ten (10) days after receipt of the objection. Attention is directed to Fed. R. Civ. P. 6(e), which adds another three (3) days from the date of mailing if service is by mail.

A district judge will make a de novo determination of those portions to which objection is made and may accept, reject, or modify the magistrate judge's determination. The judge need not conduct a new hearing or hear arguments and may consider the magistrate judge's record and make an independent determination thereon. The judge may, but is not required to, accept or consider additional evidence, or may recommit the matter to the magistrate judge with instructions. *United* States *v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000); 28 U.S.C. § 636(b)(1)(B) and (C), Fed. R. Civ. P. 73; LMR 4, Local Rules for the Eastern District of Washington.

A magistrate judge's recommendation cannot be appealed to a court of appeals; only the district judge's order or judgment can be appealed.

The Clerk of the Court is directed to file this Report and Recommendation and provide copies to Petitioner and counsel for Respondent and the referring district judge.

DATED this 13th day of December, 2001.

/s/ Cynthia Imbrogno
CYNTHIA IMBROGNO
UNITED STATES
MAGISTRATE JUDGE